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Br. of Hamline for Respondents

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

HENRY CLEWS et al.,
Petitioners,
vs.
MALCOLM M. JAMIESON et al.,
Respondents.

PETITION FOR CERTIORARI.

REPLY OF EDWIN G. FOREMAN ET AL., RESPONDENTS, COMPRISING THE GOVERNING COMMITTEE OF CHICAGO STOCK EXCHANGE, TO THE PETITION FOR CERTIORARI.

JOHN H. HAMLINE,
FRANK H. SCOTT,
FRANK E. LORD,
SOLICITORS FOR SAID RESPONDENTS.

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2524

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STATEMENT OF THE CASE.

In the above suit of *Clews et al* v. *Jamieson et al.*, the United States Circuit Court of Appeals for the Seventh Circuit, without any pleadings to suggest the same and without any argument either by appellants or appellees on that point, declared a contract entered into on the Chicago Stock Exchange between complainant's brokers Schwartz, Dupee & Co., and the defendants, Jamieson & Co., to be gambling and void. The effect of this decision is to stamp every transaction in the clearing house of said Exchange as gambling, and to brand the Exchange as a gambling house. So long as this decision stands unreversed every non-resident of the Northern Division of the Northern District of Illinois who deals on said

Exchange may go into the Federal Court and avoid his contract, and every broker of the Chicago Stock Exchange must wear the badge of a gambler. A decision so drastic, so sweeping, which affects commercial exchanges all over the country and renders insecure contracts running into millions of dollars, should not be pronounced much less permitted to prevail until argument has been first heard thereon. It is immaterial to this defendant whether the complainant or its co-defendants prevail in this suit. But it is of the highest importance to the commerce of this country that the check placed by this decision on the quick and free transmission and interchange of the property of this country represented by stocks in corporations be swept away. It is of vital importance to the prosperity if not the actual existence of the Chicago Stock Exchange that its clearing-house system be maintained. For this reason this defendant joins the complainant in asking that a writ of *certiorari* do issue in the above entitled cause, that this question may be fully investigated and finally determined by this court. As is usual with a court that attempts to decide a point that has not been made in the pleadings, without inviting or having heard argument thereon, the opinion of the lower court is based upon an entire misconception of the facts. That this court may fully understand the question involved we will state the facts somewhat in detail.

During the year 1896, and for a long time prior thereto, defendants Schwartz, Dupee & Co., brokers in stocks and bonds in Chicago, and members of the Chicago Stock Exchange, were the Chicago correspondents of complainants, Clews & Co. (Rec., 112.) Clews & Co., stock brokers of New York, were in turn the New

York correspondents of Schwartz, Dupee & Co. (Rec., 114.)

The defendant the Chicago Stock Exchange is a voluntary association of brokers, organized for the purpose of furnishing a Chicago market for stocks, bonds and other collaterals listed on that Exchange. Local stocks, bonds and securities have their sole market on the floor of said Exchange. (Rec., 121.) This market is conducted in the following manner: At ten o'clock in the forenoon of each business day Joseph R. Wilkins, the chairman of said Exchange, calls off the official printed list of securities, stocks and bonds, listed on said exchange, and anybody that wants to buy makes a bid, and anybody that wants to sell makes an offer. When any bid is accepted the sale made is entered by Wilkins' clerk. When that call is over an irregular call is made, which lasts until half past one. Wilkins then calls the different stocks that are in the clearing house, a description of which we will presently give, and the last price bid for a stock before Wilkins brings down his gavel is the clearing house price for that day. At two o'clock each day the Exchange adjourns. (Rec., 122, 131.) No one but members of the exchange are permitted to deal on the floor of the Exchange, and all transactions of buying and selling take place between the members thereof, the customers of the brokers being unknown in the transactions. In July and August, 1896, the Diamond Match stock was one of the stocks listed on that Exchange. (Rec., 122–123.) The defendant Jamieson & Co., were Chicago brokers, members of such exchange, Jamison being the president thereof. On the 16th of July, 1896, at 11:19 A. M., Schwartz, Dupee &

Co. in Chicago, received the following order from H. Clews & Co. in New York by telegram:

"Sell 500 Diamond Match at 220½ *for a/c.*

(Signed) H. CLEWS & Co."

On the same day at 11.35 A. M. Schwartz, Dupee & Co. telegraphed Clews & Co. as follows:

"Sold 500 Diamond Match 221⅛ *for the account.*

(Signed) SCHWARTZ, DUPEE & Co." (Rec., 117.)

The term "*for the account*" employed in these dispatches is a technical phrase, and while perfectly understood by these brokers requires expert testimony and a reference to the rules of the exchange to explain its meaning.

On the 20th day of July, 1896, at 9:23 A. M., Schwartz, Dupee & Co. received from Clews & Co. a telegram reading as follows:

"Sell 200 Diamond Match at 221 *for the account* at opening of market. They want put out at opening if possible, but it is good all day.

(Signed) CLEWS."

And on the same day at 10:08 A. M., Schwartz, Dupee & Co. telegraphed Clews as follows:

"Sold 200 Diamond Match 221½ *for the account.*

(Signed) SCHWARTZ, DUPEE & Co."

(Rec., 117.)

Wilkins, the chairman of the Exchange, whose evidence is uncontradicted, says that the term "account" means the account day or delivery day for the month of July, which is the last day of the month.

The first dispatch from Clews means that the Chicago broker should go on the floor of the Exchange and offer to sell 500 shares Diamond Match stock at 220½ or better, to be delivered and paid for and taken on the last day of

July. (Rec., 124.) But by the rules of the Stock Exchange which are in evidence all trades "*for the account*" must go through the Clearing House, so that the despatches in question in effect direct that these trades be made in conformity with the Clearing House rules.

Section 1 of the Clearing House rules states: Under the following regulations transactions may be made for "the account" in any securities listed for that purpose dealt in at the Exchange. Section 2 provides: Deliveries of cash stocks or transactions for "the account" shall be be made on the last day of each month. (Rec., 141.) The rules regulating these transactions we will call your attention to later on. Suffice it to say that these orders were made with reference to each and all of them. And they form a part of the contracts, Clews & Co. ordered made

Wilkins explains that for the purpose of allowing members who desire to have their stock trades run over from the delivery day of one month to that of the following, the practice of the Exchange provides, after the 25th of the month, for trading in what is known as the second account From that day until the day before the end of the month he calls stocks in the first account and the second account; the first account being the account of the current month and the second account the account for the month following. On the day before the last day of the month, or delivery day, the calling of the two accounts stops and a call is made solely of the account for the following month. (Rec., 124.)

On the 25th of July, 1896, at 11:41 A. M., Clews telegraphs Schwartz, Dupee & Co.

"Change the Diamond Match over to August account at 2½ per cent. If you cannot do it let us know at once.

(Signed) CLEWS."

Shortly thereafter, but on the same day, to wit: at 11:48 A. M., Clews sent another dispatch to Schwartz, Dupee & Co.:

"You sent us the difference this morning at 2½. At what difference can you do it now?

(Signed) HENRY CLEWS & CO."

On the same day, at 11:38 A. M., Clews telegraphs Schwartz, Dupee & Co. as follows:

"Change the 500 at 2 cents or better.

(Signed) CLEWS."

All this means just this: The price of 500 shares of Diamond Match at 221 would be $110,500; the interest on this amount of money if borrowed from a bank at 6 per cent. for one month would be, say, $552.50. If the buyer or anybody else who has a contract to buy 500 shares for July delivery does not want to take and pay for this stock on the last day of July, and lay out $110,500 therefore, but wants to get a month's time so as to have the delivery on the August instead of July delivery day, he is willing to pay as much interest as he would have to pay at the bank for the use of that much money for one month. But if he went to the bank he would have to put up collaterals which he might not have and would likely have to spend several days running around to get it and then might fail. Hence he is willing to pay for this extension, which he can get on the Exchange in five minutes, very much higher interest than he would pay at the bank if he could borrow that much at the bank. The carrying rate or interest charge at this time, it seems, was from $2. to $2.50 a share.

But a firm like Clews & Co. can afford to carry stocks over to get the high rate of interest buyers will pay for such extension. Clews & Co. can borrow money at the

lowest rate. If the party to whom Clews & Co. had sold it, whom we will call Z, did not want to pay for it on the July delivery day and would pay interest at $2.50 per share or even $2. a share Clews was willing to let him have the time and carry the trade, *i. e.*, not deliver the stock for another month. If, on the contrary, Z wanted the stock, but there was some third party, "A," in the market, who had bought 500 shares of "B," but did not want to pay for it until the next delivery day, then Clews' broker would buy of "A," at the market price, his right to such 500 shares, get an order from "A" on "B" to deliver the shares to Z, and in turn sell back to "A" for August delivery the 500 shares which were originally sold to Z, at the market price plus the interest. In other words, with the consent of all parties, and by this process of buying and selling back Clews & Co. would substitute "A" in a new trade for Z. To get this interest or carrying charges the dispatches of July 25 were sent by Clews. The $2.50 and $2 spoken of in the dispatches is not commissions nor differences in settlement of stocks, but, as Wilkins testifies, is interest, pure and simple, or carrying charges. (Rec., 125.) It differs in no way from the interest the buyer would have to pay if he went to the bank and got the use of the money represented by the stock for thirty days. It depends in no way on the price of the stock, and in no way represents or marks the difference between what the stock was originally contracted to be sold for and the market price at the day of the turn over, but is dependent on the money market, which, in the middle of the Bryan campaign, was very high.

The first dispatch on July 25th notifies the Chicago brokers that Clews wants them to find somebody who will

pay interest at 2½ per cent. for Clews carrying over 500 Diamond Match. The second dispatch recognizes that Schwartz has notified him he can get 2½ per cent., or the difference between what Clews would pay "A" for his 500 shares and what he would turn around and sell his stock back to him for August delivery, and Clews wants to know what interest he can get at the hour this second dispatch is sent. By the time the third dispatch was sent Clews was willing to carry it at 2 per cent. but wants better if he can get it.

The court will bear this in mind, because the lower court entirely failed to grasp this transaction and predicated its opinion that there was a gambling in differences largely on the language of Clews' three dispatches of July 25th, which related solely to interest.

In pursuance of these orders, Schwartz, Dupee & Co. did on July 25th go in and buy in 500 shares of stock for Clews at 227, evidently the current price that day; and did at once turn around and sell it back to the same party at the same price, plus the $2 interest for the August account, and made report of same as follows:

At 12:11 P. M., Schwartz, Dupee & Co. wired Clews:

"Bought Diamond Match 227 for the account. Sold 500 229 account 2nd.

(Signed) SCHWARTZ, DUPEE & Co."

On July 27, 1896, at 8:55 A. M., Clews telegraphed Schwartz, Dupee & Co. as follows:

"Change 200 more Diamond Match, 2 per cent. or better.

(Signed) CLEWS."

And on the same day at 10:53 A. M., Schwartz, Dupee & Co. telegraphed Clews & Co.:

"We changed the 200 Match at 2¼ difference. Will give you prices later.

(Signed) SCHWARTZ, DUPEE & Co."

On the same day at 10:55 A. M., Schwartz, Dupee & Co. telegraphed Clews as follows:

"Bought 200 Matches 226¾. Sold 200 2nd account 229." (Rec., 118.)

The difference spoken of is the difference between the market price and the market price with carrying charge or interest added. The two points on the 500 shares and 2¼ points on the 200 shares, which were changed over to August account, the court will keep steadily in mind is simply the interest the broker of the man who had bought for July delivery was willing to pay to Clews, who had sold for July delivery, in consideration of Clews changing his sale to 2nd account or August delivery As Mr. Wilkins puts it, "It is what one broker who has 500 shares of stock that he is carrying for a customer and that customer is not prepared to take it up and he is perfectly willing to pay whatever anybody else who is on the other side of the market will do it for for carrying it for thirty days." (Rec., 125.)

All this is Greek unless properly explained, and is something that none of us know anything about until it is explained. But Wilkins' explanation shows just what was intended by the above dispatches.

When understood, it is evident that a system by which a July seller may make a new trade with a July buyer, providing for delivery in August instead of July, whereby the seller gets interest for carrying the other's trade, has none of the qualities of dealing or settling in differences between contract and market prices and in no way resembles gambling. This transaction was not understood by the lower court, as is evidenced by its opinion. It was not explained to it, because the question was nowhere raised. The lower court at only one point vouchsafes to

advise us as to what evidence it relies on in deciding this transaction to be a gambling contract. It says:

"On its face, the correspondence between the complainants and their brokers speaks of 'sales of Diamond Match stock for July account' of inquiries for the 'difference' demanded to change to August account and of changes then ordered and reported as made by allowing the 'difference.'" (Rec., 181.)

These words, which, as we have just explained, relate to interest, the court imagined related to gambling in differences.

As Mr. Wilkins testifies that all trades made for "the account" must go through the clearing house, (Rec., 126.) we must now explain the *modus operandi* of the clearing house.

Section 12 of the rules of the clearing house require parties trading in stocks in the clearing house to deposit $10 per share par. (Rec., 143.)

Section 13 states margins deposited on trades in the clearing house shall be considered as a margin or as a part of the same under section 1 of article 16 of the by-laws of the Chicago Stock Exchange; all such margins to be deposited in the clearing house.

Section 1 of said article 16, therein referred to, provides:

"In any contract either party may call, at any time during the continuance of the same, for a deposit of $10 per share upon the par value of the securities bought and sold; and whenever the market price of the securities have changed so as to reduce the margin of said deposit either way below the $10, either party may call for a deposit sufficiently to restore the margin to $10, and this may be repeated as often as the margin may be so reduced. In all cases where deposits are called, they shall be made within one banking hour from the time of such call."

One of the most important functions of the clearing house is to see to it that the margins are kept up every day.

At the close of each day each broker who has traded in the account fills out a blank similar to the blank shown at page 87 of the record.

On this blank, under the appropriate headings, and opposite the names of the members of the Stock Exchange who regularly deal in the account, the broker sets out in the respective columns the number of shares bought or sold, and foots up the total at the bottom of the columns. These totals will show the number of shares he had bought of any particular stock in excess of the number of shares sold, and *vice versa*. In the sheet referred to on August 3, 1896, Jamieson & Co. cleared with themselves 300 of West Chicago bought against 8350 of the same sold The net balance or 8050 bought is what they held ready to have the Clearing House take charge of. This it does by bringing Jamieson & Co. together with some other party or parties in the Clearing House who have 8050 shares sold. So that such party will be the seller to Jamieson & Co. instead of the nine persons from whom Jamieson & Co. bought their West Chicago and who are released when the stock is cleared. This process is repeated daily until delivery day. On that day the party who is a buyer takes and pays for the stock of the party who is a seller in the clearing house of an equivalent amount of stock. But the seller may have sold Diamond Match as did Clews on July 25 at 229, and on account of the stock going down the buyer on delivery day may be in the Clearing House at 222 as were Jamieson & Co. on August 3d and entitled to the Diamond Match sold by Clews. In order that Clews may get this

229, every day the stock goes down the buyer who is released by the clearances before stepping out of the Clearing House must pay in the difference between what Clews sold at and the Clearing House price for that day. This is also necessary that the margins may be kept intact. $10 a share par on each side must be kept up all the time as security. The member daily sets out on his sheet under the column "Paid" the amounts of money which he should pay into the clearing house, and which the clearing house in return should pay to the broker on the other side of the trade, by reason of the stock having gone down that day. If the stock has gone up, he sets out under the heading "Collect," and opposite the name of the broker with whom he has the contract, the amount such broker should pay into the clearing house, to meet the amount he is entitled to draw out. All this has the effect to keep the margins up, as provided by article 16 of the constitution, *supra*. If this were not done then when Match went up from 221 to 229, the seller would have no security for the advance in price.

When the member gets his sheet all made out, he daily sends the sheet to the clearing house with his check for the amount that he owes the clearing house, or with a draft for the amount he is entitled to draw out of the clearing house, as the sheet may show. The manager of the clearing house, having all the sheets of the various members before him, checks them all up, and ascertains which members of the Exchange have stock sold in the account, and sets him off against a member or members whose sheets show that they have a net total of stock bought in an equivalent amount, and then makes a summary of everybody's transactons. He sends this summary, with a notice of substitution, to each member, in form similar to "Exhibit 8" (Rec.,

120), and pays the draft of the party who is entitled to take out margins. Thereupon each of the parties thus substituted sign cards similar to Exhibts 6 and 7 (Rec., 132-133), confirming the substitution, and the morning thereafter the same are put into the clearing house. This process continues until the delivery day, when the man found to be substituted in the clearing house as a purchaser takes the stock that is sold for that delivery day and pays therefor. (Rec., 121–129.) It thus appears that not only do the rules and customs of the clearing house daily furnish a party who is bound to take the stock, but daily the party thus substituted sends his card confirming the substitution and recognizing the contract.

Under these rules, when on the 16th of July, 1896, Schwartz sold 500 shares of Diamond stock for Clews at 221⅛, Schwartz, as well as the purchaser, were each obliged to put up $5,000 as margins in the clearing house. If the price of the stock went down during the next day one point, the buyer would be entitled to take it out at 220⅛. But if he did Schwartz, Clews & Co.'s broker, would not get the 221⅛ they had sold it for. The clearing house collects this point for their brokers daily, so that when the stock is delivered on delivery day, no matter what the price may then be, the seller receives then or in the interim just what he sold it for. (Rec., 129, 130.) By reason of this rule Schwartz & Co. in the case supposed would be entitled to draw $500 out of the clearing house, and the purchaser in turn be obliged to put up $500 in the clearing house, so that the margin is at all times kept good at $10,000 and the selling price protected. (Rec., 129.) During the whole month and up to the time of delivery the contract to deliver the stock is in force and the price which Schwartz, acting for

Clews, is to get for the stock remains the same. The same course was pursued with the contract that was changed over to the August account at 229. It was a sale by Schwartz acting for Clews & Co. The stock was to be delivered absolutely on delivery day. Whatever the price the stock may have been in the market on the delivery day, *Clews was to get in any event his selling price of 229* save as he may theretofore, from day to day, have gotten a part of that price through the clearing house, as hereinbefore explained, as the stock went down. The party who was to receive the stock on the delivery day may have been an entirely different party from the party who bought the stock when it first went into the account. But this new party had been substituted for the original purchaser by the convenient method of substitution provided for by the clearing house system. And all parties are bound by the substitution for such was their contract. (Rec., 127, 128.)

This proceeding is illustrated by the facts in this case. On the 3rd day of August, 1896, Jamieson & Co. had bought Diamond Match as follows: Three hundred shares from Adsit, 600 shares from Baldwin, Farnum & Co., 200 shares from A. O. Slaughter & Co. and 50 shares from Schwartz, Dupee & Co., or a total of 1,150 shares. (Rec., 87.) Schwartz, Dupee & Co. had, theretofore, sold 1,150 shares, including 700 shares that it had sold for Clews & Co.

The Stock Exchange clearing house department on August 3, 1896, sent a notice to Schwartz, Dupee & Co. (Exhibit 8; Rec., 120), showing that Jamieson & Co. were substituted as a purchaser for 1,150 shares of Match at 222. At the same time it sent a notice to Jamieson &

Co. (Rec., 86), notifying them that Schwartz, Dupee & Co. were substituted in the trades in which Jamieson & Co. had bought 1,150 shares of match at 222. Thereafter, and on the same day, Schwartz, Dupee & Co. signed the confirmation notice (Exhibit 6; Rec., 132), confirming the substitution of trades of Jamieson & Co. of 1,150 shares of Diamond Match sold to them at 222, and Jamieson & Co. in turn signed a confirmation card confirming the purchase made by them in substitution trades of 1,150 shares of Diamond Match bought from Schwartz, Dupee & Co. at 222. (Ex. 7; Rec., 133.) Diamond Match evidently went down on the 3rd of August after the clearing-house sheets were filed with the clearing house and before the confirmatory cards were signed, so that on that day's market Schwartz, Dupee & Co. were entitled to collect out of the clearing house $287.70, and Jamison & Co. were obliged to pay to the clearing house the same amount of money. As the doors of the clearing house closed that night, the confirmatory sheets and the checks and drafts for this amount never got into the clearing house.

If we assume that the clearing house had not closed on the night of the 3rd of August, and that the trades went along to delivery day, or assume that the 3rd of August was delivery day, it was perfectly plain that on such delivery day there would be a party substituted through the clearing house as a purchaser in the contract of 700 shares of Diamond Match made by Schwartz, Dupee & Co. for their principal, Clews & Co., who would be obliged to take and pay for said stock. Not only that but a party whose card would acknowledge that he was such a purchaser would come forth. But we hear the inquiry how can you claim that Schwartz, Dupee &

Co. were authorized by Clews & Co. to accept Jamieson at 222 when the stock was sold at 229? The answer is, that every day between the 25th or the 27th of July, when the stock was turned over to the August account, and the 3rd day of August, Schwartz, Dupee & Co., as the brokers of Clews, were receiving out of the clearing house the difference between 229, the selling price, and the clearing house price of that day, so that they had received prior to the 4th of August the difference between 229 and 222, or seven points, which they held for Clews & Co. So that Clews & Co., upon the 3rd of August would have received 222 plus the seven already received, or 229, the price at which Schwartz, Dupee & Co. sold their stock. *Keep this steadily in mind!*

Section 10 of the clearing house rules provides for the same rule as to notice, time and place that governs defaults in other contracts. Sec. 16 provides for settlement outside of clearing house on default (Rec., 142, 143;) while the regular rules of the exchange provide for sale or purchase of defaulted stock. (Rec., 140.) Sec. I of Article XV of the constitution provides "Any member who fails to comply with his contracts or who becomes insolvent shall be suspended." (Rec., 137.) It follows that the machinery of the exchange does not disclose any evidence that the parties did not intend to deliver the stock sold.

Under no circumstances by trading "for the account" *would Clews & Co. get more than 229*, the contract, and under no circumstances *would they get less.* So that the facts when properly understood demonstrate that there is no room to discuss the question of gambling in differences in this case.

It must be plain that the fact that the Stock Exchange

closed its doors on the night of the 3rd of August, due to a financial cataclysm in Chicago, does not in any way indicate that the transactions entered into in the account for the August delivery were not intended to be carried out just as we have described, or that the results we have described would not have followed. It certainly does not suggest that Clews & Co. did not intend to deliver the stock on the delivery day of August. This system of the Clearing House does not affect the contract at all, but merely furnishes a medium by which the brokers and their customers may transact their business cheaply, safely and expeditiously. Safely, in that the clearing house sees to it at all times that 10 per cent. margin is kept up by both sides to every contract. Cheaply, in that the customer by putting up a 10 per cent. margin may thereby buy or sell stocks for future delivery which he could not buy or sell otherwise without going to the bank and borrowing large sums of money. After it is all explained, it amounts to simply this: Clews & Co., selling in the account for August, sells to a purchaser for a price certain, which purchaser is ascertained through a system of substitutions in the clearing house. This purchaser is to pay the price at which the stock is sold less such sums as may have theretofore been received thereon out of the clearing house by Clews, and Clews' brokers are bound to and must deliver this stock upon the settlement day or be suspended from the Exchange.

The $10 a share deposited in the clearing house by both sides to the trade in question was kept good, and at the closing hour on August 3d there was to the credit of this trade $14,000. One-half of this was contributed by each party to the trade, $7,000 standing on that date to

the credit of Jamieson & Co., and $7,000 standing to the credit of Schwartz & Co. (Rec., 133.) This $14,000 is held by these defendants the governing committee of the Chicago Stock Exchange to secure the performance of the contract represented by the cards and clearing house sheets and notices of August 3, 1896. (Rec., 133.) This money is held by the Chicago Stock Exchange in trust for someone. To whom we shall pay it or whether we shall ever pay it to anyone, does not especially concern us; save that it is desirable to avoid a multiplicity of suits, if possible. We are not here to say that Clews & Co. are entitled to the $14,000, or should take nothing by their bill. But we are here for the purpose of challenging the opinion of Judge Seaman, sitting in the Circuit Court of Appeals, that trading "for the account" in the Chicago Stock Exchange is gambling. We are also here for the purpose of challenging the decision of Judge Grosscup that there is no privity between Clews & Co. and Jamieson & Co. and contracts by brokers "on the account" in the Chicago Stock Exchange cannot be enforced by or against their principals.

BRIEF.

THE CONTRACT IS NOT OBNOXIOUS TO SECTIONS 130 AND 131 OF THE CRIMINAL CODE OF ILLINOIS PROHIBITING GAMBLING IN DIFFERENCES.

The construction given by the Illinois courts to this statute must be adopted in considering this Illinois contract.

Melchert v. *American Union Tel. Co.*, 11 Fed. R., 195.
Ward v. *Vosburgh*, 31 Fed. R., 15.

If the contract violates the statute the Stock Exchange is a gambling house *per se*, and all of its brokers are gamblers.

Irwin v. *Williar*, 110 U. S., 499.

The order to Schwartz, Dupee & Co. by their correspondents Clews & Co., directing them to sell "*for the account*," authorized them to deal according to the rules and usages of the exchange governing trading "*for the account.*"

Bibb v. *Allen*, 149 U. S., 481.
Samuels v. *Oliver et al.*, 130 Ill., 79.

Irwin v. *Williar*, *supra*, is therefore distinguished.

The rules and usages of the exchange are a part of the contract.

Thorne et al. v. *Prentiss*, 83 Ill., 99.

The presumption as well as the proof is that Jamieson & Co. contracted with reference to such rules and usages.

Corbett v. *Underwood*, 83 Ill., 324.
Perrin v. *Barker*, 126 Ill., 201.

The language employed by Clews & Co. in the despatches being technical, the court must look into the usages and customs of the trade for its interpretation.

Lyon & Co v. *Culbertson & Blair Co.*, 83 Ill., 33–35.

Time contracts or options as to time of delivery do not violate the Illinois statutes.

Wolcott v. *Heath*, 78 Ill., 433–437.
White v. *Barber*, 123 U. S., 392.
Pickering v. *Case*, 79 Ill., 330.
Cole et al. v. *Milmine*, 88 Ill., 349.
Pixley et al. v. *Boynton*, 79 Ills., 351.

Section 130 explained in

Pearce v. *Foote*, 113 Ills., 228-234;
Union Nat'l Bk. v. *Carr*, 15 Fed. R., 438;
Tenney v. *Foot*, 95 Ill., 99;
Ibid., 4 Bradw. (Ills.), 594,

as applying solely to options to buy or sell with no intention of delivery but the transaction to be settled on differences.

Such contracts are undoubtedly prohibited by the statute.

Schneider v. *Turner*, 130 Ill., 128.
Pope v. *Hanke*, 155 Ill., 621.

But it must always appear that both parties had the intention that there should be no delivery, but merely a settlement of differences.

Jamieson v. *Wallace*, 167 Ill., 388, 396.
Soby v. *People*, 134 Ill., 71.
Edwards v. *Hoeffinghoff*, 38 Fed., 640.
Irwin v. *Williar*, 110 U. S., 499–598.

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The burden is on the party claiming the contract to be illegal to show that *both parties* intended a settlement of differences and no delivery.

Pixley et al. v. *Boynton*, 79 Ill., 351.
Scanlan v. *Warren & Co.*, 169 Ill., 142.
Rountree v. *Smith*, 108 U. S., 268.
Bibb v. *Allen*, 149 U. S., 492.

It is the duty of the court to uphold the contract unless it appears that it is an invalid one.

BREWER, J., *Bungs* v. *Hornick*, 36 Fed. R., 97.

The cases cited by the lower court do not apply to the clearing house system. A contract for stock deliverable in the future is valid though the seller has not the stock or any means of getting it save to buy it in the market.

Porter v. *Viets*, 11 Fed. Cases, 291.
Irwin v. *Williar*, 110 U. S., 499-508.

The rules of the exchange forbid option trading or fictitious contracts or failures to deliver under penalties of suspension or expulsion.

Article 15, section 1: article 17, section 1: article 29 of the constitution.
Article 4 and article 17 of the by-laws.
Section 10 of Clearing House rules. (Rec., 136-142.)

They show the parties must have contemplated actual delivery.

The fact that margins are put up is of no significance.

Union Natl. Bank v. *Carr*, 15 Fed. R., 438.
Edwards v. *Hoeffinghoff*, 38 Fed. R., 635-639.
Hansen v. *Boyd*, 161 U. S., 397, 406.

Nor the fact that the party defaulting in the putting up of margins may be sold out under the rules.

Bibb v. *Allen*, 149 U. S., 501.

Perin v. *Parker*, 126 Ill., 201, 211.

The substitution of purchasers through the clearing house is in principle no different from "ringing out" trades. This court and the Illinois courts have invariably held that such substitution does not make the contract a gambling contract.

Chicago Board of Trade—Lamsen v. *Boyd*, 161 U. S., 397-407.

Chicago Board of Trade—Clark v. *Foss et al.*, 7 Biss., 540.

Chicago Board of Trade—Ware v. *Vosburgh*, 31 Fed. R., 15.

Baltimore Exchange—Irwin v. *Williar*, 110 U. S., 499.

New Orleans Cotton Exchange—Lehman v. *Feld*, 37 Fed. R., 852-855.

II.

THERE WAS A PRIVITY OF CONTRACT BETWEEN CLEWS & CO. AND JAMIESON & CO.

The trading "*for the account*" has long prevailed on the English Stock Exchange.

Dos Pasos, Stock Brokers, 273 *et seq.*

The clearing house is but an extension of the ringing up system, and is adopted from the London and New York Stock Exchanges.

6 Eng. & Am. Ency. Law, p. 166 (2d Ed.).

The London Stock Exchange clearing house explained.
Dos Pasos Stock Brokers, 278, foot note.

The genesis of the Stock Exchange clearing house and its establishment at Frankfort, Berlin, Hamburg and London, stated in

Political Science Quarterly, June, 1893, Vol. 8, No. 2, p. 252.

The principle of substitution by clearances and the priority of contract resulting therefrom has always been recognized by the Illinois courts.

Oldershaw v. *Knoles*, 4 Bradw. (App.), 63.
Oldershaw v. *Knoles*, 6 Bradw., 325.
Curtis v. *Wright*, 40 App., 491.
Pardridge v. *Cutler*, 68 App., 569, 575.
Reibe v. *Hellman*, 69 App. Ct., 19-22.

And the fact that the ultimate purchaser may have it at a different price matters not so long as the seller gets his price then or theretofore from his predecessor in the clearing house.

Oldershaw v. *Knowles*, 6 Bradw., 325-331.

The "account" or clearing house system recognized in

Fowler et al v. *N. Y. Gold Exchange Bank*, 67 N. Y., 138.
National City Bank v. *N. Y. Gold Exchange Bank*, 101 N. Y., 595.

This system of trading in the account with substitution of buyers through rules of the Stock Exchange has met with the approval of the highest court of England.

Nickalls v. *Merry*, L. R. E. & I. App. Cases, Vol. 7, p. 530.

Cited with approval in

Irwin v. *Williar*, 110 U. S., 499.

Bibb v. *Allen*, 149 U. S., 490.

To the same effect, *vide*

Blackburn, J., in *Maxted* v. *Payne*, 6 L. R. E., 132, 147, 151, 166-180.

Hodgkinson v. *Kelly*, L. R 6 Eq., 496.

ARGUMENT.

I.

THE TRANSACTIONS IN QUESTION ARE NOT GAMBLING CONTRACTS.

The lower court in its opinion states:

"We are of opinion, however, that the transaction, as disclosed, clearly falls within the terms of the Illinois statute above cited, as interpreted by decisions of the Supreme Court of the state, and that neither the inquiry last suggested nor the sufficiency of the proof to show a wagering contract under the common law really require a decision to ascertain the invalidity of the contract thus disclosed." (Rec., 183.)

The statute referred to is set out in the opinion and consists of sections 130–131 of the Criminal Code of Illinois (1st Starr & Curtis Ann. Stat., 2nd Ed., pp. 1295–1298). These sections are as follows:

"SEC. 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any such commodities, shall be fined not than $10 nor more than $1,000 or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

"SEC. 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof shall be for any money, property or other valuable thing, won by any gaming or playing at cards,

dice or other game or games, or * by betting on the side or hands of any person gaming or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, * or for the reimbursing or repaying any money or property knowingly lent or advanced at the time or place of such play or bet, to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be null and void and of no effect."

That part of section 131 within the stars was added in 1874. The remainder of the section was enacted in 1845 (Rev. Stat., 1845, p. 263, Sec. 1), and said section is almost a literal copy of the statute of 9 Anne, Chap. 14, Pl. 1-2 (1710).

Petillon v. *Hipple*, 90 Ill., 420.

Section 130, on the contrary, was enacted for the first time in 1874, and since that time has been repeatedly construed by the Supreme Court of the State of Illinois. As the contract in question was made in Illinois, and was to be performed in Illinois, and the lower court declares that it is illegal as being obnoxious to the statutes of Illinois, this court would naturally turn to the decisions of the Illinois courts to ascertain whether the contract falls within the prohibitions of the statute.

Melchert v. *American Union Tel. Co.*, 11 Fed., 195.

If the transaction in question is illegal as being a gambling transaction, every broker who is a party to the transaction engages in gambling. and all may be indicted under the criminal code.

Irwin v. *Williar*, 110 U. S., 499.

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Moreover, every broker who has carried on a transaction under the rules of the Stock Exchange has been engaged in gambling. All transactions carried on thereunder are void, and the Stock Exchange of Chicago is nothing but a gambling hell. Not only must this be true of the Stock Exchange of Chicago, but also of the Board of Trade of Chicago and all its members, to say nothing of the Stock Exchange of New York, the Exchanges of Boston, Philadelphia, New Orleans, St. Louis, Baltimore, and the Exchange in London. For the procedure under which the transaction in question was carried on is substantially similar to that under which property is bought and sold on the exchanges referred to. In London deliveries are twice a month, on the New York Stock Exchange and on the Chicago Board of Trade the deliveries are the next morning, otherwise the *modus operandi* is the same substantially in all these exchanges.

Not only has the Supreme Court of Illinois frequently considered the statute in question, but this court has often had occasion to consider it, and has always followed the decision of the Supreme Court of Illinois construing said statute.

This court has decided that where a principal sends an order to a broker engaged in an established market or trade for a deal in that trade, he confers authority upon the broker to deal according to any well-established usage in such market or trade, especially when such usage is known to the principal, and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal, provided the transactions in which the broker is employed

is legal in its character, and does not violate any rule of law, good morals, or public policy.

Bibb v. *Allen*, 149 U. S., 481,

In the earlier case of *Irwin* v. *Williar*, 110 U. S., 499, the judgment of the court below in that case was reversed by this court, upon the point that the court permitted proof of the custom of the Chicago Board of Trade, when there was no evidence that the defendant below had knowledge of it. This court held that a custom which provided for exchange and substitution of contracts and payment of differences to effect it, working as it did a complete change in the nature of the seller's rights and obligations, could not be made without his assent, and that assent could be implied only in case of knowledge of the custom which it was claimed authorized it.

It is undisputed in this case that Clews & Co. knew that Schwartz, Dupee & Co. did business as brokers on the Chicago Stock Exchange, and in accordance with its rules and regulations, as they were their correspondents, and that in acting as their agents in the sale of stock for future delivery they were to transact the business in the Chicago market through that exchange, and in accordance with its rules and regulations.

It is the rule in Illinois that all contracts for sale, made on a commercial exchange, by one member thereof with another member, with reference to the by-laws and rules of the exchange, must be construed as if those rules were expressly made part of the contract, and when made at the exchange will be presumed to have been made with reference to those rules.

Thorne et al. v. *Prentiss*, 83 Ill., 99.

And where a person conversant with the rules and usages of the exchange employs a broker to make purchases for him on the exchange, such persons are presumed to contract with reference to these rules and usages.

Corbett v. *Underwood*, 83 Ill., 324.
Perrin v. *Barker*, 126 Ill., 201.

In *Samuels* v. *Oliver, et al.*, 130 Ill., 79, it was said by our Supreme Court:

"It is a general rule that a person dealing at a particular market will be taken to have dealt according to the known and general custom and usage of that market, and if he employs another to act for him in buying and selling at such market, he will be held as intending that the business shall be conducted according to such general usage and custom of such market; and it has been held to be the rule, whether he in fact knows it is the custom or not."

To the same effect *vide*,

Bibb v. *Allen*, 149 U. S., 499.

The language employed in the dispatch by Clews to Schwartz is highly technical, and without explanation from those familiar with the trade would be meaningless. Having been selected by Clews & Co., they are presumed to know its meaning. As was said by the Supreme Court of Illinois in *Lyon & Co.* v. *Culbertson & Blair Co.*, 83 Ill., 33–35.

"Inasmuch as the great mass of commercial business is transacted by men pressed by their affairs, and who are not in the habit, even if time would permit, of reducing their agreements to writing beyond a mere memorandum, the courts are compelled to look into the usages of trade or business to learn the real intention of the parties."

When Clews & Co. instructed Schwartz to sell "*for the account*" it instructed the latter to go on the Chicago Stock Exchange and make the "sale under the rules and regulations governing sales *for the account*" on that exchange. There is no question but that Clews adopted and intended to adopt such rules and regulations in making the trade in question. Neither can there be any question but that Jamieson & Co., members of the exchange, knew what dealing "*in the account*" was, nor any doubt but that they were familiar with the rules governing the same when they went into the clearing house and consented to be a buyer from the party which the clearing house coupled them with from day to day as they continued in the clearing house up to the 3rd of August, 1896. It follows that both sides to the contract made their contract with reference to the rules of the exchange governing trading in the account on the Chicago Stock Exchange and are bound by those rules and the contract made thereunder, unless such contract is illegal.

There can be no question raised in this case that the contract in question is contrary to the Illinois statute on the ground that it provides for a future delivery. It would not be obnoxious to the Illinois statute did it give to Clews the right to deliver any time during the month of July, instead of providing for delivery on the July delivery day

As early as 1875, the year after section 130 of the Criminal Code was adopted, the Supreme Court of Illinois in the case of *Wolcott* v. *Heath*, 78 Ill., 433-437, said:

"It is true, they were time contracts—that is, the seller had all of the month in which to deliver the grain; but the testimony of Wolcott is, they were *bona fide* con-

tracts for the actual purchase of the grain. The only option the seller had was as to the time of delivery. The obligation was to deliver the grain at all events, but it was the seller's privilege or option to deliver it at any time before the closing of business on the last day of the month. Time contracts, made in good faith for the future delivery of grain or any other commodity, are not prohibited by the common law, nor any statute of this state, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of trade."

In *White* v. *Barber*, 123 U. S., 392, this court said, with relation to a case growing out of a transaction on the Chicago Board of Trade:

"A *bona fide* contract for the actual sale of grain, deliverable within a specified future month, the only option with which is the option in the seller to deliver it at any time within such month, is not a gambling contract within the meaning of section 130, chapter 38, of the Revised Statutes of Illinois."

Mr. Justice Blatchford delivered the opinion of the court, in the following language:

"The only question involved in the suit at law is as to the correctness of the charge to the jury in the particulars specially excepted to. The proper construction of the statute of Illinois, Sec. 130 of Chap. 38 of the Revised Statutes, was determined by the Supreme Court of Illinois in *Wolcott* v. *Heath*, 78 Ill., 433, in the passage from the opinion in that case quoted by the Circuit Court in its charge to the jury. According to that construction, the contracts for the sale of No. 2 spring wheat deliverable in July, 1882, made by Barber, were not void as gambling contracts, if they were *bona fide* for the actual sale of grain, and if the only option the seller had was as to the time of delivery, the obligation assumed by Barber being to deliver the grain at all events, with the option only to deliver it at any time before the close of business on the last day of July, 1882."

The construction given by the Supreme Court of Illinois in the case just cited has never been changed by that court.

In *Pickering* v. *Cease*, 79 Ill., 330, the same language was employed. See, also, *Cole et al.* v. *Milmine*, 88 Ill., 349; *Pixley et al.* v. *Boynton*, 79 Ill., 351.

The true intent of section 130 has often been stated by the Illinois court.

In *Pearce* v. *Foote*, 113 Illinois, 228-234, the court said:

"As was said by this court in *Pixley* v. *Boynton*, 79 Ill., 351, the true idea of an option is what are called, in the peculiar language of the dealers, 'puts' and 'calls.' A 'put' is defined to be the privilege of delivering or not delivering the thing sold, and a 'call' is defined as the privilege of calling for or not calling for the thing bought. Optional contracts, in this sense, are usually settled by adjusting market values, as the party having the option may elect. It is simply a mode adopted for speculating in differences on the market value of grain or other commodities. It must have been in this sense the term 'option' is used in the statute. Such a contract is obviously fictitious, having none of the elements of good faith, as in a contract where both parties are bound, and is defined by statute as a gambling contract."

To same effect *vide Union Natl. Bank* v. *Carr*, 15 Federal R., 438.

In *Tenney et al.* v. *Foote*, 95 Ill., 99, the court approved of a decision by the Appellate Court (*Tenney* v. *Foote*, 4 Bradw., 594), in the following language:

"We may add in conclusion, we see no objection to the law as announced in the opinion adopted by the Appellate Court, and written by the Circuit judge who was formerly a distinguished member of this court."

The opinion referred to, 4 Bradwell, 594, adopts the opinion of Judge McAllister, Circuit judge, as its own.

In that opinion, set out in 4 Bradw., 594, Judge McAllister states:

"There has been much difference of opinion as regards the nature of the contract prohibited. It must be, to fall within the prohibition, a contract to have to one's self, or give to another, an option to sell or buy some commodity at a future time. The word 'option' is one much in use on the Chicago Board of Trade, and probably has more than one sense given to it there. Boards of trade for dealing in the principal products of the country are of comparatively recent origin. The system seems to have been borrowed from, and, in its general features, modeled after, the more ancient institution known as the stock exchange, in which many phrases, words and terms of peculiar local meaning came into use; and it will be found that ma[illegible]e these have been carried into and adopted in boards of [illegible]e. Now, the word 'option' was in use long ago in the stock exchange, and seems to have acquired a definite meaning. As there used, it meant 'a stipulated privilege to a party in a time contract, of demanding its fulfillment on any day within the specified limit.' Webs. Dic., Ed. 1872, p. 917.

"In practice, on the stock exchange, it was often the intention of the parties that no stock should be delivered, but the transactions settled upon differences. This became common, and the English statute was aimed at its repression because it was, in effect, gambling. Our statute is directed against the same evil, and extends to transactions in grain and other commodities, as well as stocks. So that the word 'option' as used in the statute here, taken with the context, means a mere choice, right or privilege of selling or buying; and it is the contracting for such choice, right or privilege of selling or buying at a future time, any commodity the statute was intended to prohibit, as contradistinguished from an actual sale or purchase, with the intention of delivering and accepting the commodity specified."

It is well settled law in Illinois that all contracts for the purchase and sale of property, with the understanding or agreement of the parties (whether that agree-

ment is expressed on the face of the contract or exists by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the difference between the contract and market prices, are mere wagers or gambling contracts and void.

Schneider v. *Turner*, 130 Ill., 128.
Pope v. *Hanke*, 155 Ill., 621.

But in order to invalidate the contract, it must appear that neither party has the intention to deliver the property, and that both parties have the intention of settling the differences only.

Jamieson v. *Wallace*, 167 Ill., 388, 396.
Soby v. *People*, 134 Ill., 71.
Edwards v. *Hoeffinghoff*, 38 Fed., 640.
Irwin v. *Williar*, 110 U. S., 499–508.

And the burden is on the party claiming that the transaction is illegal to show that it is, and if either party contracted in good faith he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other party.

Pixley et al. v. *Boynton*, 79 Ill., 351.
Scanlan v. *Warren & Co.*, 169 Ill., 142.

This was well illustrated in the case of

Roundtree v. *Smith*, 108 U. S., 268,

a case involving dealings between Roundtree and appellees, who were brokers on the Chicago Board of Trade. The suit was brought in the United States Circuit Court for the Western District of Wisconsin, and defendants, who interposed a plea of gambling, admitted:

"I could not say that I had any understanding on the

subject of the nature and character of the Board of Trade deals, whether the property was to be actually delivered or whether it was to be settled for.''

The court held the lower court was justified in directing the jury to find for the plaintiff.

In *Bibb* v. *Allen, supra*, this case and others were considered by this court in the following language:

" It is further well settled that the burden of proof is upon the party who seeks to impeach such transaction by showing affirmatively their illegality. *Roundtree* v. *Smith*, 108 U. S., 269; *Dykers* v. *Townsend*, 24 N. Y., 57; *Irwin* v. *Williar*, 110 U. S., 499, 507, 508. In this latter case the trial court charged the jury that ' the burden of showing that the parties were carrying on a wagering business and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face these transactions are legal and the law does not, in the absence of proof, presume that the parties are gambling. A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property, which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding, if an actual transfer of property is contemplated. A transaction which, on its face, is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further and show this understanding was mutual—that both parties so understood the transaction. If, however, at the time of entering into a contract for a sale of personal property for future delivery it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager and nothing more. * * * It is not sufficient for the defendant to prove that Irwin & Davis never understood that they were to deliver wheat in fulfillment of the sales made for them by the plaintiffs. The presumption is, that the plaintiffs expected Irwin & Davis to execute their con-

tracts, expected them to deliver the amount of grain sold, and before you can find that the sales were gambling transactions and void, you must find from the proof that the plaintiffs knew or had reason to believe that Irwin & Davis contemplated nothing but a wagering transaction, and acted for them accordingly. * * * This court approved that charge as a correct statement of the law upon the subject of what constitutes a wagering contract."

Ibid, 149 U. S., 492.

In an earlier case, *Bangs* v. *Hornick*, 30 Fed. R., 97, counsel contended that it was the absolute duty of the court to denounce the transaction there under consideration unless it clearly appeared that it was a valid and honest one. But says Judge BREWER:

"I think the duty of the court is precisely the reverse, and that it is the duty of the court to uphold it unless it appears that it was an invalid and dishonest one."

Apply these principles to the case at bar.

There is no evidence in this case that Clews did not intend to deliver the stock that he contracted to sell, or that Jamieson & Co. did not intend to receive and pay for the same. If the plea of gambling had been set up by the defendants Jamieson & Co., such plea must have been overruled, unless it appears to the satisfaction of the court that the method of procedure adopted by the Chicago Stock Exchange necesssarily and of itself constituted gambling. Such opinion could only be predicated upon the rules of the clearing house.

The view of the lower court that the contract was a gambling contract is, as we have shown, due largely to an entire misconception of what the dispatches referred to.

But the authorities cited by the lower court in no way impugn the clearing house system.

The case of *Irwin* v. *Williar*, 110 U. S., 499-508, cited by the court, holds that a contract for the sale of goods to be delivered at a future date is valid even though the seller has not the goods or any other means of getting them, than to go into the market and buy them.

In the other case cited by the lower court, *Embree* v. *Johnson*, 131 U. S., 336, "the evidence showed that the purchase or delivery of actual cotton was never contemplated, either by the defendant or the said Moody & Jamieson. It was understood between them that the settlement was to be made between said parties by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations of the market."

Ibid., 338.

Bibb v. *Allen*, 149 U. S., 481, cited by the court in its opinion, approved the charge of the lower court to the jury that there was no evidence in the case upon which a verdict for the defendant Bibb (who interposed a plea of gambling) could rest. The contract sued on was not a gambling contract and was, therefore, valid. This court pointed out that the rules and regulations of the New York Cotton Exchange, which recognized no contracts except for the sale and purchase of cotton to be actually delivered, were germain, competent and relevant in showing that the parties did intend an actual delivery of the cotton in question, saying, "These rules and regulations imposed upon the seller the obligation to deliver the cotton sold, and upon the purchaser the obligation to receive it, except in certain specified cases which have no application to the present case."

Article 15, section 1, of the rules of the Chicago Stock Exchange provides as follows:

"Any member who fails to comply with his contracts, or who becomes insolvent, shall be suspended until he has settled with his creditors."

Article 17 of the same rule provides as follows:

"Fictitious Sales, Bids and Offers. Sec. 1. No fictitious sale shall be made. Any member contravening this section shall, upon conviction, be suspended by the Governing Committee."

Article 29 provides:

"Any member of this Exchange who is interested in, or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security without a bona fide purchase or sale of such commodity or security in a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the Exchange."

Article 4 provides:

"No sale of securities shall be made on which a deposit shall be offered as the limit of liability."

Article 17 of the by-laws provides:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by section 2 of the preceding article, employ an officer of the board to close the same forthwith in the Exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under this rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting as well as that of the member giving the order shall be announced."

Section 10 of the rules governing the clearing house, provides:

"The same rules as to notice, time and place that govern defaults in other contracts shall apply to transactions in 'the account.'" (Rec., 140–142.)

These rules show that the Stock Exchange certainly contemplated delivery; the transaction itself shows that delivery was intended, and there is no proof that delivery was not intended by the parties.

Complaint certainly cannot be made that the rules of the Stock Exchange require parties to put up margins as security for the performance of their contracts. If the contract itself is lawful, the putting up of margins to cover losses which may occur from the fluctuations of prices and the final settlement of the transaction according to usages and rules of the exchange are entirely legitimate and proper.

Love J., in *Union Natl. Bank* v. *Carr*, 15 Fed., 438.

Sage J., in *Edwards* v. *Hoeffinghoff*, 38 Fed., 635-639.

An instruction to this effect was assumed to be correct by this court in

Hansen v. *Boyd*, 161 United States, 397-406.

The fact that the rules of the exchange allow the party to be sold out if he defaults in his margin in no way affects the validity of the transaction.

In *Bibb* v. *Allen*, *supra*, the cotton advanced beyond the price at which it was sold for delivery, and plaintiffs below, in pursuance of the rules and regulations of the New York Cotton Exchange, called upon Bibb & Co. to put up mar-

gins covering the advance in price, and were finally notified that if they did not put up margins they would be sold out. In pursuance of notice Allen & Co., plaintiffs below, went into the market and bought cotton "to cover" that which they had sold for account of Bibb & Co., and to make good their contracts. The court says:

"This they were required to do, both by the terms of their contracts with the parties to whom the cotton had been sold, and by the rules and regulations of the exchange, of which they were members. If they had failed 'to cover' or comply with such contracts, they would have been liable to expulsion from the exchange. The cotton which they bought 'to cover' these contracts was purchased at the market price."

Ibid, 149 U. S., 501.

And the court held that the difference between that price and the price of bales previously sold and plaintiff's commissions constituted a claim against Bibb & Co., for which they were entitled to recover.

The court in the same opinion proceeds as follows:

"In the case of *Perin* v. *Parker*, 126 Illinois, 201, 211, where the transactions were similar to those in question here, it was said by the Supreme Court of Illinois: 'Parker, as agent for Perin, and acting under his orders, sold the corn for Perin, and under the rules of the Board of Trade and the custom of the Chicago market, he was personally bound to the purchasers on these contracts of sale. Parker and Perin were dealing with reference to such rules and such custom with which they were both perfectly familiar. The rules of the Board of Trade provided that on time contracts purchasers should have the right to require of sellers 10 per cent. margins, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above said price. The price of corn had been rapidly advancing since the date of the sales. Parker either had deposited

margins upon the contracts or was liable to be called on for the 10 per cent. and the additional margins by the persons to whom he had sold the corn. The evidence does not seem to disclose whether or not the purchasers had either received or called for margins. Even if they had not, yet there was an existing legal right in them to call on Parker for margins, and a legal liability upon the latter, within the next banking hour thereafter, to deposit the margins called for, and also, within that time, deposit with the secretary of the board, or the parties calling for such deposits, duplicate certificates of deposit, signed by the treasurer of the board or an authorized bank.' "

Bibb v. *Allen*, 149 U. S., 481–501.

Nor does it support the opinion of the lower court to suggest that the method of substitution of purchasers will in any way invalidate or render illegal the contracts in question.

In *Hansen* v. *Boyd*, 161 U. S., 397–407, a suit was brought by Boyd and others, members of the Board of Trade of Chicago, against Hansen to recover the amount of payments alleged to have been made for account of defendant on account of purchase and sale of certain grain made for account of the defendant in the City of Chicago. Hansen pleaded that the transactions in question were mere wagering contracts. Hansen was generally familiar with the manner in which business was done on the Board of Trade of Chicago, and testified that he supposed the transactions were to be conducted for him on the Board of Trade at Chicago; but claimed that at none of the interviews between himself and the plaintiff's agent was any allusion made to the Board of Trade or the rules of the Board of Trade; and also that it was not his intention to buy or sell any grain, but that he contemplated mere speculation on margins. Hansen became delinquent in furnishing mar

gins, and May wheat was bought on his account at various prices. Later on, the brokers requested his consent to transfer the May to June wheat. Hansen gave no satisfactory response to this inquiry, and later on, in April, plaintiffs sold May wheat on which Mr. Hansen was in default for margins, at a given price, and the loss was charged against Hansen's account. Plaintiffs then bought June wheat and sent a memorandum notice of the May wheat and the purchase of the June wheat to Hansen, together with an account of the loss sustained on the May wheat; and failing to get settlement of the account, in June closed the open contracts on their books, by sale of June delivery wheat, and charging the loss and commissions against Hansen.

Among other instructions given for the plaintiff, and to which the defendant excepted, is the following:

"I might say to you here that if you find from the evidence that any of these contracts had been offset under the rules and regulations as prescribed by the Board of Trade of Chicago, offsets between persons and dealers connected with that board through whom these plaintiffs operated, that is not evidence of their illegality. The mode of settlement of *bona fide* contracts for the sale of actual wheat does not affect the validity of the contract if the original intention was to purchase, receive, take and deliver the actual wheat at the time specified when the contracts were made."

But the court held that taken into consideration with other instructions offered there was no objection to this instruction. The court did hold that the changing over of the May wheat into June for and on behalf of the defendant, without the consent of Hansen, was unauthorized and to that extent required a remittitur; but never suggested or dreamed of holding that "ringing out the trades" by off-sets in any way made it a gambling transaction.

No intimation was made in *Irwin* v. *Williar*, *supra*, that "ringing out" the trades made the contract a gambling trade.

This same view of the validity of contracts on the Chicago Board of Trade was expressed at an early date in *Clark* v. *Foss et al.*, 7 Biss., 540.

That was a suit brought in the Circuit Court for the Western District of Wisconsin, by the assignee of a bankrupt to set aside certain promissory notes and a mortgage securing the same on the ground that the same were given to secure payments growing out of option contracts on the Chicago Board of Trade, which, it was claimed, were gambling transactions and contrary to the law of the State of Illinois. In that case it appears from the statement of facts by the court the outsider having failed to perform his contract, the brokers performed their contract by going upon the market and purchasing the wheat and corn; that as to 30,000 bushels of corn they made a delivery, and as to 8,000 they closed out the deal in the manner before indicated by mutual offset and adjustment of differences; that this adjustment of differences is a mere matter of convenience to members of the board, and to their customers; that no person is under the least obligation to settle in that way; that dealers may, and often do, insist upon an actual delivery of the grain, and that settlement frequently saves their customers the cost of insurance and storage; that the object of forming these rings or clearing house is to close out the transactions, and get them off their books, and this is what they call ringing it out; but that it frequently cannot be done in that way, as if, for any reason, one whose assistance is essential to complete the circle prefers an actual delivery, in which

case the ring is broken, then each must perform his contract by actual delivery of the grain.

The court held that settling by the "ringing up" process did not make it a gambling contract.

This case, according to the decision of Judge DYER, in *Ward* v. *Vosburgh*, 31 Federal, 15, was appealed from the Circuit Court; and in an oral opinion delivered by DRUMMOND, circuit judge, contracts involved in the foregoing case were sustained, and the decision of the District Court was affirmed.

In *Ward* v. *Vosburgh*, *supra*, Judge DYER pointed out that the Wisconsin statute was broader in its scope than the Illinois statute and that hence the decisions in the Wisconsin court did not apply to an Illinois transaction. Noting that *Barnard* v. *Bachhaus*, 52 Wis., 593, was based upon the Wisconsin statute and should not control an Illinois transaction, Judge DYER said:

"*Clark* v. *Foss*, in many of its prominent features, is on all fours with the case at bar, involving also the validity of settlements made by the so-called ringing up process and the contracts out of which that case arose, were sustained. * * * In *Clark* v. *Foss*, *supra*, the 'ringing up process' is commented upon, and shown to be in and of itself a legitimate method of adjusting differences in accordance with the rules of business prevailing in the clearing houses of the country.

"In *Williar* v. *Irwin*, *supra*, it was said by Judge GRESHAM in his charge to the jury:

"'The testimony tends to show that a general custom obtained among grain commission merchants in Baltimore to the following effect: When one commission merchant, upon the order of a customer, sells to another commission merchant a quantity of grain for future delivery, and it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase

the same or a larger quantity of the same kind of grain for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, that then, in such case, the two commission merchants meet together, and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts, and restoring any margins that may have been put up; and from that time forth the first commission merchant holds for the benefit of the customer for whom he sold the order or contract of the purchaser for whom he bought, so that the grain of the selling customer may, when delivered, be turned in on the order or contract of the purchasing customer, and that the commission merchant is held responsible as guarantor to his customer. The evidence also tends to show a custom obtained among commission merchants in Baltimore to the further effect that, though the second transaction may have been had with a different commission merchant from the one with which the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain for like delivery, so that the seller owes the wheat to the buyer to whom he sold and he to another who owes like wheat for like delivery to the first commission merchant, that then, in such case, they settle by what they call a 'ring,' that is, they all reciprocally surrender or cancel their contracts, adjust differences in price between themselves, and surrender all margins that have been put up; that in all such cases the commission merchant substitutes the contract of another customer in place of that with the commission merchant whose contract has been canceled or surrendered; and that he guarantees to his customer the performance of the contract originally made in his behalf.'

"This is a very good statement of what the testimony in the the case at bar shows transpired between the parties, in the transactions here in question; and Judge Gresham held that the customs referred to were founded in commercial convenience, and that they were not in contravention of the law, but valid.

"The Supreme Court of the United States, in the 110

U. S., 499, in its review of the case above cited reversed the judgment of the court below upon another point, but did not question the correctness of Judge Gresham's ruling upon the validity of the method of business referred to, by which differences were adjusted.

"I must hold, therefore, that for want of adequate proof of an actual intention on the part of both the defendant and the parties with whom the plaintiff as his agent dealt, not to make real sales and purchases, or not to make actual deliveries of property sold and purchased, the contention that the contracts were mere gambling transactions is not established."

Ward v. *Vosburgh*, 31 Fed., 17.

In *Lehman* v. *Feld*, 37 Federal, 852 (Southern District of Mississippi), the practice of ringing out trades on the New Orleans Cotton Exchange was claimed to be evidence of a gambling transaction. Judge Hill, in denying this claim, referred to the rules of said exchange and said:

"These rules and regulations do not require the members purchasing or selling on the floor of the exchange to disclose the names of those for whom they sell or purchase, but each member or firm making such sales or purchases must guaranty, and become personally bound for, the performance of all contracts so made, as though each was a principal, instead of an agent. The members of the exchange may at stated times, or whenever it is agreed upon between themselves, 'ring out' or 'close out' the said contracts of purchases or sales, by striking a balance, or setting off one contract against another, so as to substitute one for the other; the seller being still prepared and liable to deliver, and the purchaser to receive and pay for the same quantity of cotton, of the grade and at the price stipulated in the original contracts at the time stated for delivery; each being bound to the other on the guaranty assumed, but on behalf of the unknown principals. These rules and regulations further provide that, to secure the performance of the contracts

by each individual or firm so contracting a margin of $1 per bale shall be deposited at the time of the contract, and shall be renewed from time to time, as the rise or fall in price may require, according to the conditions prescribed in these rules and regulations, by which all of the members are governed. * * * The testimony of the plaintiffs is that they had purchased, or obtained upon adjustment of balances, as provided by the rules and regulations, other cotton contracts of the same grade, in the same quantity, to be delivered at the same time, and to be paid for at the same price, and held the same to replace those originally purchased, and it is these substituted contracts which were closed or sold out, resulting in the loss to recover which this suit is brought.

It is insisted on the part of the defendant that the proof does not show the plaintiffs set off on their books and appropriated these substituted contracts in place of the original contracts, so as to render those making them liable to the defendant; and hence, at the time of the alleged sale, producing the loss for which the action is instituted, plaintiffs held no contracts on behalf of defendant or those for whom he acted. * * * It was necessary that the plaintiffs should have had contracts for the delivery of cotton of the same quantity, at the same price, and at the same time provided in the original contracts of purchase —contracts corresponding in all respects with the original contracts had they remained uncanceled and in force; in other words, contracts to be substituted for the original contracts. * * *

"These rules and regulations recognize the right and duty of the members to settle balances with each other, as before stated, so that the cancellation of the original contracts was not a violation of the duty and obligation of the plaintiffs towards those for whom they dealt."

Ibid., 855.

II.

THERE WAS PRIVITY OF CONTRACT BETWEEN CLEWS & CO. AND JAMIESON & CO.

The cases already cited, which involve the question of "ringing out" of trades on the various exchanges, establish the privity of contract between the seller and the parties substituted by the "ringing out" system as purchaser from his broker. The decisions were necessary, as in those cases the system was attacked on the ground that it was a part of a gambling system, under which contracts were cancelled through mutual set-offs. Before calling your attention to other cases where the contracts, performed by the ringing out of trades, were sought to be set aside or avoided on the ground of like privity, permit us to call your attention to the genesis of the Stock Exchange clearing house.

The reason we call attention to these decisions on ringing up trades, is, that they have been thoroughly discussed by the Illinois courts, and universally sustained. But the ringing up of trades is only another name for the clearing house system, and it is fair to assume that a court that will sustain the substitution of a purchaser in the ringing up of trades will sustain the substitution of a purchaser by means of a *clearing house.*

The trading "for the account" is borrowed from the practice of the English Stock Exchange, and the system is fully explained in Dos Pasos on Stock Brokers and Stock Exchanges, page 273 *et seq.*

On the London Stock Exchange the account day, or, as we call it, delivery day, is twice a month. An outgrowth of trading "for the account" or contracting for

a future delivery day and the ringing up of trades therein is the Stock Exchange clearing house. The author of the American & English Ency. of Law, 2d Edition, states:

"The utility and convenience of a clearing house system have led to its adoption in commercial transactions other than those between banks. In London there is a railroad clearing house, by means of which distribution is made among the different companies associated in the proceeds of through traffic over the several railways; and there has also been established in the same city a Stock Exchange clearing house, which undertakes to adjust exchanges consisting of moneys or moneys' demand, or quantities of stock; and in New York there appears to have been organized and operated by a single banking corporation a department known as the clearing house for the general clearance of contracts for the purchase and sale of gold."

Ibid., Vol. 6, p. 116.

Dos Pasos, in his work on Stock Brokers, *supra*, speaks of the organization of the London Stock Exchange clearing house in the following terms:

"An important extension of the clearing principle was effected by the establishment in 1874 of the London Stock Exchange clearing house, which undertakes to clear not sums of money, but quantities of stock. As stock brokers settle their transactions only once a fortnight, or in consols once a month, it naturally arises that in the intervals the same broker will usually have bought the same kind of stock for one client and sold it for another. The very same stock may have passed through several different hands, and the same brokers may have had reciprocal dealings with each other. Instead then of actually making transfers of stock for each transaction and paying by checks which greatly swelled the business of the Lombard street clearing house on settling day, a plan has been arranged according to which each member of the clearing house prepares a statement of the net

amount of each stock which he has to receive from or to deliver to each other member. The manager of the house, after verifying these accounts, which should balance in the aggregate, directs the debtor members to transfer quantities of stock to the creditor members in such a way as to close all the transactions. * * * A separate clearing is, of course, to be made for each kind of stock. It is found that the quantities actually transferred do not exceed ten per cent. of the whole transactions cleared, and the checks drawn are diminished on settling days as much as ten millions sterling. (Jevon's Money and the Mechanism of Exchanges, pp. 281, 282.)"

Ibid., 278, foot note.

Mr. Alexander D. Noyes, in an article in the *Political Science Quarterly*, Vol. 8, No. 2, page 252, June, 1893, states that the system of a clearing house for stocks was adopted in the New York Stock Exchange in the early months of 1892, but had been in existence elsewhere for at least twenty-five years. He says:

"Ordinarily in the first experiments they took the form of so-called 'ringing out' contracts in the same security. By this plan, if A sold B a given amount of one security, and if B had personally sold the same amount to C, the series of trades may be personally adjusted between the three traders, so that the only actual exchange required would be the transfer of the securities from A to C. Of course, the number of traders in the series might be extended indefinitely, for the system did not require that the prices at which the trades were made should have been uniform."

The author notes that the first efficient establishment of this kind in Europe was founded in the Handel's kammer at Frankfort, May, 1867; the Berlin Exchange adopted the system in 1869, Hamburg in 1870, Vienna in 1873 and London in 1876. But while the Paris Bourse has never established a regular clearing-house for stocks, the members by voluntary compari-

son of accounts by brokers' representatives, similar in its general workings to the system of bank clearances, attain the same ends.

Such being the genesis of the clearing house, we observe that it is simply an expansion of the ringing up system. The views of the Illinois courts, therefore, as to the validity and effectiveness of the ringing up system are especially important. For if those courts hold that privity of contract exists between C, who by the ringing out of the trades between himself, B and A becomes substituted as buyer from A instead of B, the original buyer, they must hold that it is immaterial whether C is not found until the delivery, so long as B or somebody else is the purchaser during all the intervening period.

The earliest and one of the most instructive of cases is that of *Oldershaw* v. *Knoles*, 4 App., 71. It happily illustrates how unmeaning to a court modern commercial contracts are without proof of customs of the market wherein the contract is to be performed, and how certain, definite and complete they turn out to be when the customs of the local market are fully explained. In that case Oldershaw, the broker on the Chicago Board of Trade, got this dispatch from Knoles, a resident of Jacksonville, Illinois:

"If April lard, ten ninety, buy two fifty."

"The court found this dispatch meant that if lard deliverable at such time in April as either might elect could be purchased at prices specified, this broker was to buy for him 250 tierces. The broker filled the order and subsequently received two other orders which he filled, buying all told 1,000 tierces. With the last purchase Knoles remitted $700 to be used as margins on the purchase. The price declining rendered this sum too small for margins, and Oldershaw demanded more margins which

appellee failed to advance, whereupon appellant sold all the purchases at a considerable loss, for which and his commissions he brought suit."

Upon the trial it was found that after the several purchases of lard by the plaintiffs for the defendants and before the sale of the same by the plaintiffs in the market the plaintiffs as to 750 tierces of lard settled the said purchases with the members of the Board of Trade, from whom the same were made, they in each case realizing a small profit, and made a settlement of the remaining 250 tierces, suffering a small loss.

Appellant, so the opinion states (p. 67), offered to prove that,

"as to the said purchase of lard made on behalf of appellee, the three settlements made prior to February 21st were effected in the following way, and not otherwise: that after making said purchases in the ordinary course of business upon the board of trade, it was found that appellants had sales made on account of other parties, customers of appellants, who were entirely responsible, for corresponding amounts of lard of the same delivery to the extent of 750 tierces; that such sales were made to said customers of appellants, either directly to the same parties from whom the purchases were made for appellee, or to some other person or persons who had sold lard to the parties from whom it had been purchased by appellants for appellee; that finding out this condition of facts after said purchases had been made on account of appellee, appellants, in accordance with the general custom and usage obtaining in such matters upon the Board of Trade, made the settlements as to the 750 tierces of lard with the parties from whom they had it purchased; that by such settlements appellants obtained no interest whatever in the lard bought for appellee, but that the effect of such settlements in each case was merely to discharge the party from whom the lard had been purchased for appellee, by substituting in his stead another entirely responsible person for whose account appellants had the

lard sold, leaving appellants responsible to such new party to carry out the contract of purchase, and making such new party liable to appellee, in all respects, to deliver the lard through appellants to him as the party from whom appellants had originally bought the lard for appellee," and the appellant also offered to prove that "for a long time prior to making the settlements in question, had been the general custom and usage upon the Board of Trade, to make settlements between the commission merchants upon mutual consent and for their mutual convenience, of the character described by the witnesses, in such cases as that at bar, where it is found that purchases and sales have been made of and to the same party directly or indirectly; that by such settlement the commission merchant substituted for his customer the reponsibility of a party for whom he had previously made the sale for that of the party from whom he had made the purchase, and that such substitution was in accordance with the uniform custom and usage of dealers on the Board of Trade in such cases."

This offer was denied; and the Appellate Court of Illinois for the First District said:

"If the evidence offered had been admitted, it would have appeared that by a general and uniform custom upon the Board of Trade settlements of this character were made, and another responsible seller of the same commodity substituted for the one originally furnished to the customer. It must be deemed that this custom was within the meaning and intention of appellants and appellee; that appellee had it in view when he employed appellants to make such purchases for him, and that it entered into and formed a part of the contract between the parties.

The exceptions to the rule authorizing the admission of evidence of custom or usages of trade are where such custom would vary the terms of an express contract, or contravene an established rule of law. As we have already seen, there was in this case no express contract between the parties, any of the terms of which were repugnant to the custom and usages sought to be proved. Nor are we able to perceive that such custom is in contravention

of any established rule of law. It would have been entirely competent for these parties, by *express* agreement, to have provided for a substitution by the appellants of one vendor for another, precisely as was sought to be done in this case. Appellee might have expressly authorized appellant to buy for him the lard in question of one party, and to subsequently exchange such contract for that of any other responsible party they might select, provided only that some contract of a responsible seller in appellee's favor should all the time be kept open so as to secure the delivery of the lard at the time agreed upon. No rule of law would be contravened by such express contract, and precisely the same may be said of a contract implied from the circumstances and the usages of trade. If such provision would be valid in an express contract, it would be equally so in an implied contract." * * *

In response to the contention that by virtue of the custom, a broker became personally interested in the business of his principal, and thus assumed a position adverse to those for whom he was employed to act, the court said:

"Appellants were engaged in a general business as commission merchants. In such business they were acting not merely for appellee, but doubtless for many other customers as well. The profits derived from the various settlements made by them under the rules of the Board of Trade belonged, not to themselves, but to their customers. A substitution for a purchase made of a third party of a like commodity previously or subsequently sold for another customer, rendering such other customer an account of the differences received or paid on settlement of the original deal, would not, we think, involve the commission merchants in any interest in the business adverse to their principal. It is true, in all these transactions, they had an interest as nominal principals, and as actual guarantors to those for whom they dealt. Such interest, however, we think was not obnoxious to the principle of law sought to be invoked. * * * By these settlements they obtained no interest whatever in the lard bought for appellee; the effect was, in each case, to dis-

charge the party from whom the lard had been purchased for appellee, by substituting in his stead another responble vendor, for whose account appellants had already made an equivalent sale of lard, leaving appellants responsible to such new party to carry out the contract of purchase, and making such new party liable in all respects to deliver such lard to appellee. through appellants, in the place of the party from whom appellants had originally made the purchase for appellee."

Ibid., 4 Bradw. (Ills.), 72, 73.

The case went back for a new trial and upon said trial the trial court allowed evidence of the custom to be introduced, but held the custom was void. Upon appeal to the Appellate Court, again Judge Bailey, speaking for the court recited the offer made upon the first trial, that said settlements were made in pursuance of

"a general custom and usage prevailing on the Board of Trade, by which, whenever it was ascertained that a commission merchant had made a contract of purchase, for future delivery, of a given quantity of a particular commodity, and had also made with the same or some other party a contract of sale of a like quantity of the same commodity for the same delivery, and (in case the two contracts were made with different parties) where it appeared that such parties had outstanding similar contracts with each other, either directly or through other dealers, so as to form a chain or ring of contracts for the purchase or sale of a given quantity of a particular commodity for the same delivery, a clearance or settlement was immediately effected between the parties, as between themselves, each paying or receiving the difference between the price fixed in his contract of purchase and that fixed by his contract of sale; that such clearance or settlement was made by mutual consent of the commission merchants concerned, and for their mutual convenience, and that its effect upon the rights of their customers for whom contracts of sale or purchase for future delivery had been made, was to merely substitute in case of a purchasing customer the contract of another customer for whom the merchant had

already made a sale, in place of the contract of the third party from whom he had made the purchase in the first instance, and *vice versa.*" *Oldershaw* v. *Knoles*, 6 Bradw. (Ill. App.), 325-329.

The court after referring to its former opinion said:

"But even if the validity of the custom or usage established by the evidence was an open question in this case we are still of opinion that it is valid." *Ibid.*, 6 Bradw., 331.

You will observe that this "ringing out" is precisely what the clearing house does in the case at bar. Only in the clearing house of the exchange the "ringing out" is done every day until the final delivery day, the contract of sale being in force all the time with some one.

But it was urged in that case, as in this, that there could not be a subsisting contract, because in the ringing out the substituted contract to buy was not identical in price with the contract canceled. In the case at bar it was urged by Jamieson's counsel and by Judge Grosscup of the Circuit Court, that Clews having authorized a sale at 229 could have no contract with Jamieson at 222. (Rec., 94.) But Judge Bailey quickly disposed of that contention, as follows:

"It is urged, however, that even conceding the validity of the custom authorizing a commission merchant, on making clearances or settlements with other members of the Board of Trade, to substitute with his customer in place of the contract canceled by the settlement another contract, identical in terms, previously made by him for another customer, the contracts sought to be substituted in the present case were not identical in point of price with the contracts canceled, and for that reason could not be so substituted.

"It should be observed that according to the custom in question a commission merchant can be a party to such clearance or settlement only when he appears in one contract as a purchaser and in another as a vendor of the

same amount of a particular commodity for the same delivery. If he is dealing as a commission merchant solely, and not on his own account, as appears to have been the case with the plaintiffs, he must have made a contract of purchase for one customer, and a contract for the sale of the same amount, for the same or some other customer, both for the same delivery. The contract must necessarily be identical in terms in all respects except as to price. But the evidence shows that by the process of settlement this difference, if any exists, is provided for and compensated. For example: if a dealer has made for A, one of his customers, a contract to sell 5,000 bushels of wheat at $1 per bushel, and for B, another customer, a contract to purchase the same amount, at 95 cents per bushel, he collects on the settlement the difference between these two prices, and passes the same to the credit of A, thus reducing the amount. A will, therefore, be entitled to receive for his grain 95 cents per bushel, the precise amount B contracted to pay. The process of settlement merely releases the dealer from his liability to other members of the board, and brings together two of his customers, a seller and a buyer, and makes them parties to one contract." *Ibid.*, 6 Bradw., 331.

In the case at bar, every day after July 27th, Diamond Match was going down. Schwartz was taking out of the clearing house for Clews, from the purchasers substituted, the difference between the price at which it was sold, or 229, and the clearing house price, so that on August 3d, when the price struck 222, he had collected seven points. As Schwartz was Clews' agent, Clews got the money. In other words, on August 3d, if Jamieson had paid 222, Clews, by Schwartz taking down these margins, would have 229 in his pocket, the price at which he sold it. Clews was never to get less than 229 and never to get more than 229.

In *Curtis* v. *Wright*, 40 Illinois Appellate, 491, the court followed the decision in the Oldershaw case, and

held that it was no error for the lower court to refuse to give an instruction to the jury as follows:

"Unless you believe from the evidence that the defendant, Curtis, had competent knowledge of the rules, regulations and usages of the Board of Trade relating to settlement of contracts, by off-sets, and relating to the exchange and substitution of contracts, then Henry Curtis was not and is not bound by such rules, regulations and usages; nor in that case could or did any substituted, exchanged or off-set contract, if any were made by the plaintiff for him, supplant or take the place of any original contracts, if any were made by the plaintiffs for him, upon said Board of Trade."

In *Pardridge* v. *Cutler*, 68 Illinois Appellate, 569–575, the court followed the Oldershaw case, and said:

"It was shown that all through these dealings appellant's transactions were closed out by what is known as 'ringing up,' and this, it is said, was improper. 'Ringing up,' it appears, is nothing more or less than the setting-off of one trade against another—a thing which occurs in great cities in mercantile transactions as to 95 per cent. of the entire volume of business; that is to say, in great cities, on purchases and sales of merchandise to the extent of $100,000, in the settlement of the same, upon the average less than $10,000 in money is actually paid, payments being made through checks upon bank, credit balances being set off against each other. The closing up of transactions on the Board of Trade for the purchase and sale of grain, by setting off one trade against another—in the parlance of the exchange, 'ringing up'—is necessarily no more illegal or improper than is the setting off of credit balances by merchants through checks on banks. True it is, as is urged by appellant, that thereby the identity of the transaction by him had upon the board was lost; that is to say, having purchased a thousand bushels of corn from A, and sold a thousand bushels of corn to B, if each transaction was closed out by a setting off of one against the other, he then had a contract for the delivery of grain with neither. Such result was for his convenience, and entailed upon him no loss, and such method of closing

up transactions was a thing of which he was during all these years well aware, without making complaint thereof. *Oldershaw* v. *Knoles*, 4 Ill. App., 63; *Oldershaw* v. *Knoles*, 6 Ill. App., 325."

While this case of *Pardridge* v. *Cutler* was reversed, *Ibid.*, 168 Ill., 104, the reversal was on an entirely different point.

In *Riebe* v. *Hellman*, 69 Ill. App. Ct., 19–22, the court said:

"That in the purchase and sale of this wheat, that there was what is known as 'ringing up' does not make the transaction illegal. *Pardridge* v. *Cutler*, First Dist. Ill. Opinion filed February 1, 1897."

As already suggested, the clearing house system does not differ in principle from the system of "ringing up" trades. The statement of facts shows that under the clearing house system the buying broker, in effect, agrees that on the "delivery" day he, or some one else ascertained by the clearing house, will receive and pay for the stock sold. The seller agrees to accept such person so ascertained by the clearing house on "delivery" day as the buyer, and deliver the stock to him. By trading "*for the account*" the buying and selling brokers agree, with every other member of the Stock Exchange who enters into said account, that the manager of the Stock Exchange as the agent for all the parties may, each day, clear the trades made in "*the account*," so that upon the expiration of the day following the sale, the stock sold will be deliverable to whoever, by the system, may appear on the sheet as being the purchaser in the clearing house for an equivalent amount of stock. On the next day similar action takes place, and upon the "delivery" day whoever is in the clearing house as the purchaser, for the number of shares contracted to be sold, stands ready and is obliged, by the

rules of the Stock Exchange, to take the shares of stock from the broker of the seller first spoken of. Margins are kept up in the meantime, and the daily difference between the selling price and the clearing house price is paid in from day to day by the purchaser or the seller, as the stock may decline or rise in value, so that the margins deposited may always be kept intact at $10 per share. The transaction in itself is equivalent to broker A employed by the outsider to sell, saying to broker B, with whom he makes a contract, and to all other members of the Chicago Stock Exchange who go into the clearing house: "I contract to sell to B and to whoever shall, through my agent, the manager of the clearing house, be found upon the "account" day under contract to buy shares of stock, equivalent to the shares of stock I have this day contracted to sell B." On the contrary, the buying broker says to the selling broker, and to his undisclosed principal, in effect, "I will buy from you so many shares of stock for future delivery, but I retain the right to have my trades cleared in the clearing house, and upon the "account" day there will be ascertained by our mutual agent, the manager of the clearing house, myself or some one in my place who will take the stock so contracted to be bought by me."

The convenience of this system has been remarked upon and approved in *Fowler et al.* v. *New York Gold Exchange Bank*, 67 New York, 138.

The system is described in *National City Bank* v. *New York Gold Exchange Bank*, 101 New York, 595.

The objection that by this substitution of buyers and sellers there is no contract with any one, though specious, is really without merit, as shown in the Illinois cases above referred to.

This same objection was disposed of at an early date by the English courts. A case involving the practice on the London Stock Exchange, quite similar to the account system as carried on in the Chicago Stock Exchange, was considered by the House of Lords in 1875, in *Nickalls* v. *Merry*, L. R. E. & I. App. Cases, Vol. 7, p. 530. According to the then existing rules and usages of the London Stock Exchange, the outsider, through his broker, a member of the Exchange, would sell to another broker, also a member of such Exchange, shares of stock to be delivered on the account day. The buying broker on the day preceding the account day (usually called the name day), was bound to pass to the selling broker a ticket containing the name of the person or of several persons as the purchaser or purchasers of the said shares, or he might, if he pleased, pass his own name as such purchaser, in which latter case only would he have bound himself to take the share. Until the name day it was not seen who might stand ultimately, either as purchaser or seller, or, in other words, who might be the person to transfer or take the shares. Until then the buying broker may have had a great many transactions, both buying and selling, with the same brokers, or with various brokers. On the name day, in the case supposed, if the buying broker, having purchased, had sold again, a ticket containing the name of the person to whom the shares were to be transferred would have been issued by and passed on from the ultimate buying broker to his seller, and so on through the hands of the other intermediate sellers and buyers of stock, who had dealt in the shares, until it reached the hands of the original selling broker. In this way it sometimes happened that the same ticket passed through

the same parties' hands several times in fulfillment of bargains made with other members. The original selling broker was not bound to deliver and transfer shares to the ultimate purchasing broker until the expiration of ten days after the account day. During this interval he might object to the parties named by his buyer, and a committee of the Stock Exchange would decide as to the validity of any such objection, and might require another name to be given, in case they considered it right to do so; but after the lapse of these ten days the selling broker was required to deliver the certificates and transfers of shares to such ultimate purchasing broker.

Speaking of the sale thus made Lord Chelmsford said:

"The contract upon which the question arose, having been made between a broker and a jobber, members of the stock exchange, the usage of that body entered into and to a certain extent determines and governs the nature and effect of the contract. The jobber's (the purchasing broker) contract therefore is of this description. It is at first a temporary and conditional contract, but it becomes absolute upon his failure to furnish by the name day the name of a person capable and willing to become the transferee of the shares, so that the seller, by executing a transfer, may make with him a new contract in substitution of the original one with the jobber."

Lord Hatherly said:

"It has been contended on the part of the appellant, and so far justly contended, that the person employing a broker on the Stock Exchange to sell shares in that market, which has been established for the sale of shares, must be taken to conform with the usages and customs which have been established by the parties in that market as among themselves, for the general conduct of their business. It must be supposed to intend that his share shall be sold subject to that condition. So far, well and good. But

then, what is the condition? Nobody denies that when a broker sells shares for his principal (who is what is called an 'outsider' and who has employed him to sell the shares) to anybody in the market, there is a good and valid contract made between these parties—that is to say, between the person whose shares are to be sold and the broker who purchases those shares for the vendor's broker. There is a contract, and that contract must be fulfilled. It must be a contract with somebody, and it must be fulfilled, in the first instance, by him who made it—that is to say, by the jobber. But there is open to the jobber, according to the practice and custom of the Stock Exchange (and there it is that the practice of the Stock Exchange comes in) the option of saying, I will give to you the name of a person who has authorized me to give his name instead of my own, and who will perform my contract for me, and when that name is given to you you shall have an opportunity of inquiring into that person's name (ten days I think is the time allowed for such inquiry), and you shall thereby satisfy yourself that the person I name is a person whom I may reasonably propose to you as the person who is to perform the contract which I have with your broker; after which, the contract which I have made will cease, and if he is a person whom it is reasonable for me to substitute for myself as contracting with you, you shall have the means to satisfy yourself as to his responsibility in point of means to fulfill that engagement which I have taken upon myself. NOW THESE ARE VERY REASONABLE RULES OF THE STOCK EXCHANGE, and nobody can find fault with them, for the very enunciation of them implies that there is a contract to be transferred, and that there is a person to whom that contract is to be transferred and can be transferred." *Ibid.*, p. 546–547.

In the *Nickalls* case, just as in the account system, a contract was entered into by the selling broker with the ultimate buyer, whereby, through the instrumentality of certain other persons, whoever they may be, certain shares shall be sold and bought,

and an undertaking was entered into to complete the contract with the person, whoever he may be, who was found under the account system to be the buyer on delivery day. It is immaterial to the seller to whom the shares are to be delivered, as it is to the first buyer, to know from whence they came. The fact that under the English system the name presented on name day must be acceptable to the seller, or, he demurring, to the Stock Exchange committee, does not affect the principle which governs the validity of such a transaction.

The Nickalls case is cited with approval by the Supreme Court of the United States in

Irwin v. *Williar*, 110 U. S., 499, and
Bibb v. *Allen*, 149 U. S., 490.

Maxted v. *Payne*, Law Rep., 6 L. R. Exch., 132, cited in petitioners' brief, is to the same effect.

Blackburn, the author of Blackburn on Sales, in speaking of a similar contract, says:

"The undisclosed principals of those two members can, at law, enforce, and are by law liable for, the contracts made by their agents."

Ibid., 147.

At page 151 he says:

"What difference does it make that the contract was on the Stock Exchange *for the account*. I have no doubt that the plaintiff, now seeking to enforce the contract made on his behalf, must take the contract as it really was, incorporating in it all the usages relative to said contracts, and the questions—what are those usages—what is their extent and what do they mean—are all questions of fact to be ascertained by evidence, but when once they are ascertained the legal effect of the customs upon the contract is a question of law."

He continues:

"There may be a great many intervening members between the two. The ticket, which the member A holds at the name day, bearing on it the name Z as the original issuer and which contains the name and address of one, a member or non-member, or the person into whose name Z intends the shares to be transferred, may have passed through the hands of as many members as might be designated by all the intervening letters of the alphabet, and may have been split a dozen times, and the issuing member may have been a jobber or broker, and the intervening members may have been brokers or jobbers, or both, and the holding member may be either a broker or jobber—still the result will be that the holder of that ticket is brought in contact with the issuer of it, and both must necessarily be members of the Stock Exchange."

He concludes his instructive opinion as follows:

"If the parties entering into this contract were agents (as Sandiman & Co. were for Mexted; Foster & Co. were for Spry), I appehend their principals, though undisclosed and unknown, would be parties to the contract, and would be subject to the same liability as their agents, and entitled to have the same benefit of the contract. * * * And the convenience of it, in the present case, may be made clear by supposing that A, holding a ticket issued by Z, which had passed through the hands of members, whom we may designate by the other letters of the alphabet, and that Z, without any valid reason, refused to pay. If there is no privity between A and Z it will be necessary, in order to enforce the performance of Z's duty, for A to sue B, B to sue C and so on until, ultimately, Y will sue Z before Z, at the expense of twenty-five law suits, be compelled to do his duty by a process very troublesome and costly; whilst, if there is a privity between A and Z, it may be enforced by a direct suit between those parties; and this imposes no hardship upon the issuer of the ticket, as it only places him in the same position relatively to the holder of it in which he would have stood towards his first vendor, if that vendor had never passed away

the ticket but had himself delivered the shares direct. * * * It seems to me that the ultimate novation of the customer must be between the members, and when it takes place it puts the member issuing the ticket under an obligation to fulfill exactly that duty which, before that novation, he would have had to fulfill to the member with whom he had originally contracted." *Ibid.*, pages 166 and 180.

In *Hodgkinson* v. *Kelly*, L. R., 6 Eq., 496, Romilly, M. R., said:

"It is in my opinion an engagement entered into by A on one side and E on the other that, through the instrumentality of certain other persons, whoever they may be, certain shares shall be sold and bought, and they undertake to complete the contract with the person, whoever he may be, who buys on one hand and sells on the other."

These authorities conclusively establish a privity of contract between Clews & Co. and Jamieson & Co. The facts in the case at bar leave no room for the application of the doctrine announced by this court in *Irwin* v. *Williar*, 110 U. S., 499, that the usage of the Stock Exchange would not be binding upon an outsider, unless he actually knew of such usage. The custom is certainly binding upon Jamieson & Co. They were members of the exchange. It was certainly binding upon and known by Clews, because Clews expressly directed that his trade should be made "*for the account*," employing the technical terms to describe the transaction, which the rules above referred to provide the machinery for carrying out.

A man is presumed to intend the necessary result of his own actions and words. And Clews is presumed to know what dealing "*for the account*" is, when he directs a sale to be made by a Chicago broker in the Chicago stock market "*for the account.*"

For these reasons, we feel that this court should grant the petition for *certiorari*, in order that it may investigate and determine these two questions, so that the members of stock exchanges throughout the country, and those dealing with them, may know whether, despite the authorities in Illinois and everywhere else, it is the doctrine of the Federal courts that all such transactions are gambling *per se*, and are not enforceable for lack of privity of contract.

Respectfully submitted.

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